IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 14, 2008

MARCO PEÑA MEDINA v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2006-A-883 Steve Dozier, Judge

No. M2007-02543-CCA-R3-PC - Filed September 30, 2008

In March 2007 the petitioner, Marco Peña Medina, pled guilty to one count of conspiracy to sell more than three hundred grams of a Schedule II controlled substance, a Class A felony. The trial court sentenced the petitioner to a term of twenty years in the Department of Correction as a Range I, standard offender. The petitioner subsequently filed a petition for post-conviction relief, alleging that he received ineffective assistance of counsel and that his guilty plea was not entered voluntarily and knowingly. After a hearing, the post-conviction court denied the petition, and the petitioner appealed. After reviewing the record, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed.

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J.C. MCLIN, JJ., joined.

Jeremy W. Parnham, Nashville, Tennessee, for the appellant, Marco Peña Medina.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Amy H. Eisenbeck, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The record reflects that in March 2006, the petitioner was indicted on one count of conspiracy to sell three hundred grams or more of a Schedule II controlled substance (cocaine) and one count of possession of three hundred grams or more of a Schedule II controlled substance with intent to control or deliver. This indictment resulted from an incident that occurred in June 2005. In March 2007, the petitioner pled guilty to the first count of the indictment; pursuant to the indictment, the petitioner was sentenced to twenty years in the Department of Correction and the second count of the indictment was dismissed. On May 31, 2007, the petitioner filed a pro se petition for post-conviction relief. In the petition, the petitioner argued that (1) he "was illegally seized and arrested;" (2) he was convicted of an offense "which was based on [a] fatally defective indictment;" (3) the evidence produced at trial was insufficient to support his testimony in that it was "based upon

inconsistent testimony, which denied [the petitioner] due process rights;" (4) his guilty plea was unknowingly and involuntarily entered; (5) the trial court "failed to explain[] the ramifications of [the] petitioner's plea agreement;" and (6) he received the ineffective assistance of counsel. Counsel was appointed[1] and an evidentiary hearing was held on September 21, 2007. The proof presented at the evidentiary hearing was limited to the ineffective assistance of counsel and involuntary/unknowing guilty plea issues.

At the evidentiary hearing, the petitioner, through an interpreter, testified that he was born in Mexico and could not read or write in English, although he could read and write in Spanish. He said that he attended school in Mexico through the sixth grade, which he believed to be the equivalent to the sixth grade in American schools, although he said he was unsure if this assumption was actually true. He said that he was between seventeen and eighteen years old when he stopped attending school.

The petitioner testified that he was represented by two attorneys from the time of his arraignment through the entry of his guilty plea. He said that counsel were deficient because they did not fully explain his release eligibility to him, despite his telling counsel that he did not understand the principles of sentencing. The petitioner testified that counsel told him that his sentence under the plea agreement would be twenty years at thirty percent, but counsel did not explain what "twenty years at thirty percent" meant. The petitioner said he was unable to calculate his release eligibility because he "[did not] know how to do mathematics." The petitioner also testified that one of his attorneys told him that "he believed that in one year they were gonna let me go." The petitioner said that had he known that he would have served more than one year in prison, he would not have entered a guilty plea in this case.

The petitioner testified that at the plea hearing, the trial court asked him, through an interpreter, if he understood that he would be serving a twenty-year sentence and that he could be considered for parole after serving thirty percent of the sentence. He admitted that he told the trial court that he understood the terms of his sentence, but he only did so because his attorneys told him that "nothing else could be done" at that point and that he "couldn't back out now."

The petitioner said that his attorneys met with him approximately four times before he entered his guilty plea, and that each time counsel provided an interpreter to facilitate communication between the petitioner and counsel. The petitioner said that he could not fully understand the various interpreters counsel employed, and because some of the interpreters had headphones in their ears during the meetings, he could not hear what they were saying. The petitioner said this problem persisted despite his alerting counsel of his difficulty understanding the interpreters.

[1] Appointed counsel did not file an amended post-conviction petition.

Finally, the petitioner testified that in his opinion, his attorneys should have tried to procure a lesser sentence. He noted that since he had been in jail, he had "found out about other cases, drug cases, where they g[a]ve people less time." He reiterated that he only pled guilty and accepted the twenty-year sentence because he believed he would serve one year in the penitentiary before being deported to Mexico.

On cross-examination, the petitioner admitted that at the plea hearing, he told the trial court that he was satisfied with counsel's representation. However, he said that he did so only because he did not believe that he could say anything about his attorneys in court. He also admitted that the interpreter who was present at this evidentiary hearing was the same interpreter who was present at the plea submission hearing. The petitioner said that he had no problem understanding this interpreter. The petitioner also said that he was provided with a copy of his plea agreement that was written in Spanish, and that he was able to read the document.

The petitioner's lead counsel, who has been licensed to practice law in Tennessee since 1983, testified that he and co-counsel[2] represented the petitioner from the petitioner's preliminary hearing to the time the petitioner entered his guilty plea, a span of six and a half months. Counsel said that he and co-counsel discussed with the petitioner such things as the nature of the charges against him, the anticipated proof against the petitioner, the anticipated discovery materials, and whether this case would proceed in federal or state court.[3]

Regarding the petitioner's sentence, counsel testified that he and co-counsel, accompanied by an interpreter, met with the petitioner on at least six occasions between his arraignment and his plea date, and that during these discussions, counsel discussed with the petitioner "possible sentences and targets that we would like to achieve, based on [the petitioner's] understanding of what he'd been charged with and what we had advised him the possible range of punishment would be." Counsel asserted that he and co-counsel told the petitioner that they could not guarantee when or if the petitioner would be granted parole; counsel said that he only told the petitioner that he would be eligible for parole after serving thirty percent of his sentence. Counsel said that he did tell the petitioner that, based on his immigration status, his chances of being paroled once he served thirty percent of his sentence would be "enhanced" so that deportation proceedings could occur. Counsel said that he and co-counsel offered to assist the petitioner with parole proceedings once he served the requisite percentage of his sentence. Counsel also said that he had a specific "recollection that [co-counsel] literally did the math and showed [the petitioner] . . . how long he would be in custody before he would reach the thirty-percent-of-twenty-years mark." Counsel also said that he explained

[2] Co-counsel did not testify at the evidentiary hearing.

[3] Counsel testified that while several persons arrested along with the petitioner were indicted in federal court, the petitioner was never indicted in federal court.

to the petitioner that he would be eligible to receive sentence-reduction credits for the time he spent in custody from the day of his arrest to his plea date.

Counsel said that he and an interpreter met with the petitioner the day before the plea hearing to review the plea agreement and ensure that the petitioner "could have the opportunity to fully understand [the plea]." Counsel said that on the day of the plea hearing, he briefly met with the petitioner before the hearing and asked him, in Spanish, if he wished to go forward with the plea. According to counsel, the petitioner indicated that he still wished to enter the plea. On cross-examination, counsel said that he told the petitioner that he would be eligible for "two-for-one [sentence reduction] credit within the Department of Correction[]," but counsel insisted that he told the petitioner that the increased credit "would not be something that automatically happen[ed]."

On September 26, 2007, the post-conviction court issued an order denying the petition for post-conviction relief. The petitioner then filed a timely notice of appeal.

ANALYSIS

Standard of Review: Post-Conviction Proceedings

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. Tenn. Code Ann. §40-30-110(f) (2006). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Petitioner's Guilty Plea

The defendant initially contends that he did not enter his guilty plea knowingly, voluntarily, and intelligently. The petitioner bases this assertion on several grounds, including: (1) he did not wish to enter a guilty plea at the plea acceptance hearing but was coerced into entering the plea after counsel "told him it was too late, there was nothing else that could be done[,] and he had no other choice"; (2) counsel's allegedly inaccurate advice that the petitioner would serve one year in the penitentiary before being deported to Mexico; and (3) counsel's alleged failure to advise him of his release eligibility. The state argues that the post-conviction court properly found that the petitioner's plea was entered voluntarily, intelligently, and knowingly. After reviewing the record, we agree with the state.

When analyzing the voluntariness of a guilty plea, we look to the federal standard announced in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969), and the state standard established in State v. Mackey, 553 S.W.2d 337 (Tenn. 1977). State v. Pettus, 986 S.W.2d 540, 542 (Tenn. 1999). In Boykin, the United States Supreme Court held that there must be an affirmative showing in the trial court that a guilty plea was voluntarily and knowingly given before it can be accepted. 395 U.S. at 242. Similarly, the Tennessee Supreme Court in Mackey required an affirmative showing of a voluntary and knowledgeable guilty plea, namely, that the defendant has been made aware of the significant consequences of such a plea. Pettus, 986 S.W.2d at 542. A plea is not "voluntary" if it results from ignorance, misunderstanding, coercion, inducements, or threats. Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993). The trial court must determine if the guilty plea is "knowing" by questioning the defendant to make sure he or she fully understands the plea and its consequences. Pettus, 986 S.W.2d at 542; Blankenship, 858 S.W.2d at 904.

Because the plea must represent a voluntary and intelligent choice among the alternatives available to the defendant, the trial court may look at a number of circumstantial factors in making this determination. Blankenship, 858 S.W.2d at 904. These factors include: (1) the defendant's relative intelligence; (2) his familiarity with criminal proceedings; (3) whether he was represented by competent counsel and had the opportunity to confer with counsel about alternatives; (4) the advice of counsel and the court about the charges against him and the penalty to be imposed; and (5) the defendant's reasons for pleading guilty, including the desire to avoid a greater penalty in a jury trial. Id. at 904-05.

In this case, the petitioner has not established by clear and convincing evidence that his guilty plea was not entered voluntarily, knowingly, or intelligently. Although the petitioner testified that he had no prior involvement with the judicial system, and although he said that he only attended school in Mexico through the sixth grade, he testified that he was able to read and write in Spanish, and that he was able to understand the Spanish-language version of the written plea agreement that he reviewed before the plea hearing. At the plea hearing, he said that he understood the nature of the charges against him and his rights under the law.

The strongest factor weighing against the petitioner's assertion is the nature of his representation by trial counsel. Initially, we note that the post-conviction court did not accredit the petitioner's assertions that counsel failed to inform the petitioner of his release eligibility, guaranteed the petitioner that he would be released after serving one year in prison, and pressured him into entering a guilty plea . Rather, the trial court accredited the testimony of the petitioner's former lead counsel, who testified that he and co-counsel explained to the petitioner how much time he would have to serve before becoming eligible for parole but made no assurances regarding an actual release date. The record reflects that counsel met with the petitioner on several occasions in the period between the petitioner's arraignment and his guilty plea, including a meeting the day before the plea hearing where counsel, the petitioner, and an interpreter reviewed the plea agreement to ensure that the petitioner fully understood the nature of the plea. Accordingly, we deny the petitioner relief on this issue.

Ineffective Assistance of Counsel

The petitioner also contends that he received ineffective assistance of counsel during the period leading to his guilty plea. On appeal, the petitioner bases his argument on counsel's supposed failure to accurately advise him regarding his release eligibility, and on counsel's alleged failure to procure an interpreter whom the petitioner could understand. The state argues that the post-conviction court properly concluded that the petitioner "failed to demonstrate that he received deficient counsel and that this alleged deficiency resulted in prejudice to him." After reviewing the record, we agree with the state.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockart v. Fretwell, 506 U.S. 364, 368-372, 113 S. Ct. 838, 842-44 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694. The Strickland standard has been applied to the right to counsel under Article I, Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner will only prevail on a claim of ineffective assistance of counsel after satisfying both prongs of the Strickland test. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997). The performance prong requires a petitioner raising a claim of ineffectiveness to show that the counsel's representation fell below an objective standard of reasonableness or was "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. The prejudice prong requires a petitioner to demonstrate that "there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 69. "A reasonable probability means a probability sufficient to undermine confidence in the outcome." Id. Failure to satisfy either prong results in the denial of relief. Id. at 697.

The petitioner's arguments regarding counsel's alleged deficiencies in advising the petitioner concerning his release eligibility are addressed above. Based on our earlier analysis, we conclude that the petitioner has not shown by clear and convincing evidence that counsel was deficient as to this issue, nor has he established that counsel's advice regarding his release eligibility prejudiced him. Regarding the petitioner's contention that counsel was ineffective for failing to provide an interpreter whom the petitioner could understand, we note that the petitioner did not raise this issue

in his post-conviction petition. This court has routinely held that in post-conviction cases, as with all appellate cases, this court "will not address issues raised for the first time on appeal." Shelvy Antwain Baker v. State, No. M2005-01760-CCA-R3-PC, 2006 WL 2956511, at *10 (Tenn. Crim. App. Oct. 13, 2006) (citing State v. Alvarado, 961 S.W.3d 136, 153 (Tenn. Crim. App. 1996); State v. Turner, 919 S.W.3d 346, 356-57 (Tenn. Crim. App. 1995)), perm. app. denied (Tenn. Feb. 26, 2007). Furthermore, as the petitioner did not present testimony at the evidentiary hearing of any of the interpreters employed by counsel, he has not presented evidence to support his contention that he was prejudiced by counsel's actions regarding the interpreter issue. Concluding that the petitioner has failed to establish that he received ineffective assistance of counsel as to either of his stated issues, we deny the petitioner relief.

CONCLUSION

Upon consideration of the foregoing and the record as a whole, the judgment of the post-conviction court is affirmed.

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D. KELLY THOMAS, JR., JUDGE